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July 3, 1997

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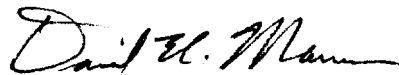
Re: CC Docket No. 97-137

Dear Sir/Madam:

Enclosed please find an original and 11 copies of the Reply Comments of the Michigan Cable Telecommunications Association in the above-referenced matter. The Comments are also contained on the enclosed 3.5" computer diskette formatted in Word Perfect 5.1. Also enclosed is the Proof of Service.

Very truly yours,

FRASER TREBILCOCK DAVIS & FOSTER, P.C.



David E.S. Marvin

DEM/maf
Enclosures

cc: Department of Justice
ITS, Inc.
Michigan Public Service Commission

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of:

Application by Ameritech Michigan
Pursuant to Section 271 of the
Telecommunications Act of 1996 to
Provide In-Region, InterLATA
Services in Michigan

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CC Docket No. 97-137

**REPLY COMMENTS OF THE MICHIGAN CABLE
TELECOMMUNICATIONS ASSOCIATION**

Fraser Trebilcock Davis & Foster, P.C.
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Telecommunications Association

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Date: July 3, 1997

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SUMMARY

Checklist item (iii) requires Ameritech Michigan to provide nondiscriminatory access to its poles, ducts, conduits and rights-of-way at just and reasonable rates. Thus, this checklist item consists of three partes: (1) access; (2) just and reasonable rates; and (3) nondiscrimination. In its comments, the Michigan Public Service Commission (MPSC) found that Ameritech Michigan provides access to one CLEC, but completely failed to address the other two parts of the checklist item; i.e., whether Ameritech Michigan's rates are just and reasonable and whether Ameritech Michigan is engaging in discrimination.

The Michigan Cable Telecommunications Association files this reply establishing that the pole attachment rate being charged by Ameritech Michigan to the only competing LEC with pole attachments is unjust and unreasonable because Ameritech Michigan charges a rate that is more than double the maximum pole rate allowed by law. Moreover, Ameritech is discriminating against the CLEC by imposing a rate which is different than Ameritech's published tariff rate.

I. INTRODUCTION

The Michigan Cable Telecommunications Association ("MCTA") timely filed initial comments in this docket on June 10, 1997. In its comments, MCTA primarily focused upon the issues critical to the Michigan cable industry as it attempts to bring competition to Michigan's local telephone market. In particular, MCTA specifically detailed the facts establishing that Ameritech Michigan is not in compliance with the requirements of the 14-item competitive checklist because Ameritech Michigan has failed to satisfy the third item on the checklist which requires nondiscriminatory access to poles, ducts, conduits and rights-of-way owned or controlled by Ameritech Michigan at just and reasonable rates. (47 USC §271(c)(2)(B)(iii).)

MCTA files these reply comments in response to the Consultation of the Michigan Public Service Commission ("MPSC Comments") dated June 9, 1997 and its statement that it "appears Ameritech satisfies" the checklist item requiring nondiscriminatory access to poles at just and reasonable rates. In those Comments, the MPSC first determined that the information provided by Ameritech with respect to pole attachments was "on its face . . . misleading." After sorting out the facts, the MPSC found that only one competing local exchange carrier, Brooks Fiber, had any pole attachments on Ameritech poles. Based on this fact, the MPSC concluded that Ameritech was providing access to its poles. While this finding may have satisfied the checklist requirement to provide access, the MPSC wholly failed to address whether the rate being charged was just and reasonable and whether Ameritech was applying its rate in a nondiscriminatory manner.

In this reply, MCTA establishes that the only competing LEC with attachments on Ameritech poles is being charged a rate which is clearly excessive and unlawful. In fact,

the rate is 238% of the maximum rate allowed by law. It appears that the rate being charged is based on a tariff which the MPSC rejected and which Ameritech Michigan itself withdrew. In addition, Ameritech's charges are not only unreasonable, but also discriminatory because they are higher than the rate in Ameritech's published pole attachment tariff. As a result, Ameritech Michigan is not in compliance with the 14-point checklist because it fails to provide nondiscriminatory access to poles at just and reasonable rates.

II. ANALYSIS

A. Under Section 224, Michigan Has Opted To Regulate Pole Rates And Has Adopted The Standard Established By The Federal Pole Act Of 1987

The Federal Act provides that the FCC will regulate the rates, terms and conditions of pole attachments unless a state certifies to the FCC that it will regulate pole attachments. (47 USC §224(c).) The FCC has recognized that Michigan has submitted the necessary certification to regulate pole attachments. (Public Notice to FCC RCD 7535, December 30, 1987.) Even Ameritech Michigan expressly admitted this fact when it stated that "... state law is the controlling statute with regard to the pricing of poles, ducts, conduits and rights-of-way." (Ameritech Michigan's Submission of Additional Information in MPSC Case No. U-11104 dated March 27, 1997 at p 10.)

In 1995, the Michigan legislature amended the Michigan Telecommunications Act, 1991 PA 179, as amended, being MCL 484.2101 et seq; MSA 22.1469(101) et seq (the "MTA") and adopted specific statutory language set forth in the Federal Pole Attachment Act of 1987 for determining just and reasonable pole rates for cable and telecommunications providers. Section 361 of the MTA, in relevant part, states:

"(2) A provider shall establish the rates, terms and conditions for attachments by another provider or cable service.

"(3) The rates, terms and conditions shall be just and reasonable. A rate shall be **just and reasonable if it assures the provider recovery of not less than the additional costs of providing the attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the attachment, by the sum of the operating expenses and actual capital costs of the provider attributable to the entire pole, duct or right-of-way.**" MCL 484.2361(2) and (3); MSA 22.1469(361)(2) and (3).

In interpreting this statutory language, the MPSC recently acknowledged that the "Legislature borrowed the FCC's standard in enacting Section 361 [of the MTA]." (February 11, 1997 Opinion and Order, p 22 in MPSC Case Nos. U-10741, U-10816 & U-10831.)

B. While The MPSC Addressed the Issue of Access To Poles, It Wholly Failed To Address Whether The Rate Was Just And Reasonable Pursuant To The MTA or Whether Ameritech was Engaging in Discrimination.

With respect to the information submitted by Ameritech Michigan regarding pole attachments, the MPSC correctly concluded that "this information on its face is misleading." (Consultation of the Michigan Public Service Commission at p 35.) After, sorting out the facts from the misleading data supplied by Ameritech Michigan, the MPSC found that only one competing LEC was being provided access to Ameritech Michigan's poles. This one competing LEC was Brooks Fiber with 68 attachments. (*Id.*) The MPSC's comments were silent on the issue of whether the pole rate being charged to Brooks Fiber was just and reasonable under Michigan law. The MPSC's silence was likely the result of

Ameritech Michigan's total failure to present any evidence as to the pole rate it was charging Brooks Fiber or any evidence establishing a just and reasonable rate.

Similarly, the MPSC simply ignored the issue of discrimination, despite the fact that checklist item (iii) requires proof of three separate points: (1) access; (2) just and reasonable rates; and (3) nondiscrimination.

C. The Pole Rate Being Charged To The Only Attaching LEC Is 238% Of The Maximum Rate Allowed By Law

As amply demonstrated in the initial comments of the MCTA dated June 9, 1997, the maximum allowable pole rate for Ameritech Michigan under Section 361 of the MTA is \$1.21 per pole per year. (See Exhibit 1 of MCTA's Comments dated June 9, 1997.) Yet, the invoices submitted to Brooks Fiber as of December 10, 1996 charged a pole rate of \$2.88 per pole per year. (Attachment A.) This means that Ameritech Michigan's pole rate is 238% of the maximum rate allowed by law (i.e., 138% higher than \$1.21). As a result, Ameritech Michigan's pole rate is excessive and clearly unlawful.

D. It Is Discriminatory For Ameritech To Charge Brooks Fiber A Pole Attachment Rate Which Is Higher Than Ameritech's Published Tariff Rate.

On December 10, 1996, Ameritech Michigan billed Brooks Fiber at a rate of \$2.88 per pole attachment per year. (Attachment A.) This rate was blatantly discriminatory because it failed to even comply with Ameritech's own pole attachment tariff on file with the MPSC since September of 1996.¹ The rate contained in that tariff, while excessive under Michigan law, imposed a rate of only \$1.97 per pole per year, not \$2.88.

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48933

¹ The fact that Ameritech Michigan has filed a tariff with the MPSC regarding pole attachments does not mean that there has been any finding that the terms or rates are just

It appears that Brooks Fiber was billed \$2.88 per pole per year based on a previous pole attachment tariff. That prior tariff, however, was rejected by the MPSC and voluntarily withdrawn by Ameritech before Brooks Fiber received its invoices dated December 10, 1996. (See Exhibits 3 and 4 to the Comments of the Michigan Cable Telecommunications Association dated June 9, 1997). Despite the lack of any basis to charge a competing LEC \$2.88 per pole per year, Ameritech unfairly required Brooks Fiber to pay this excessive fee. By billing Brooks Fiber a different and higher rate than set forth in its published tariff, Ameritech clearly discriminated against Brooks, thus violating both the MTA and checklist item (iii).

III. CONCLUSION

In its Comments, the MPSC recognized that the information provided by Ameritech Michigan with respect to pole attachments was misleading on its face. Nonetheless, the MPSC stated that it appeared that Ameritech Michigan complied with the competitive checklist item because it provided 68 pole attachments to one competing LEC. Yet, the Michigan Public Service Commission's comments wholly ignored the issue of whether the rate charged to Brooks Fiber was just and reasonable and the issue of discrimination.

It is undisputed that Michigan law governs the appropriate pole rate and that the Michigan legislature has adopted the FCC formula. As a result, the maximum allowable pole rate which Ameritech Michigan may charge to a CLEC is \$1.21 per pole per year. Yet, as demonstrated by the attached invoices, Ameritech Michigan charged Brooks Fiber an excessive and unlawful rate which was more than double the maximum allowable rate.

and reasonable. No determination has been made by the MPSC that either the terms or rates in this tariff are just and reasonable.

In fact, Ameritech Michigan has engaged in unlawful discrimination by charging Brooks a rate which is even higher than its published tariff rate of \$1.97 per pole per year (which, itself, is wholly unsupported, unlawful and excessive).


The Federal Act mandates that Ameritech Michigan must comply with all 14 checklist items. Ameritech Michigan cannot satisfy the checklist by choosing to comply with some items and not others. Here, it is unequivocally demonstrated that Ameritech Michigan is not providing competing LECs with nondiscriminatory access to its poles at just and reasonable rates.

IV. RELIEF REQUESTED

WHEREFORE, the Federal Communications Commission should reject Ameritech Michigan's Section 271 application.

Fraser Trebilcock Davis & Foster, P.C.
Attorneys for The Michigan Cable
Telecommunications Association

Dated: July 3, 1997

By: 
David E. S. Marvin (P26564)
Michael S. Ashton (P40474)

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(517) 482-5800

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48933

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06/17/97 TUE 17:33 FAX

Billing Summary



Previous Balance	6,186.20
Payments	6,186.20

BROOKS FIBER COMM
DAN KEY
515 56TH STREET SW
GRAND RAPIDS MI 49508

Past Due	0.00	Current Charges	0.00	Total Amount Due	0.00
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DETAILED CHARGES

ADCT NO. C6511

DUE DATE DEC 10, 1996

FOR BILL INDUSTRY 1-800-225-1847
AUTHORIZED BY JONNA REESE
DETAIL OF CURRENT CHARGES
SERVICES
MATERIAL
CONTRACTOR COSTS
ADJUSTMENTS
TAXES
LATE PAYMENT CHARGE
TOTAL CHARGES FOR THE MONTH OF NOV 1996

0.00
0.00
0.00
0.00
0.00
0.00
0.00

DESCRIPTION OF SERVICES

ANNUAL BILL DUE 1/1/96 - 12/31/96
50 ATTACHMENTS @ \$2.38 = \$119.00
5769 FT. OF CONDUIT @ \$1.05 = \$6,058.20
TOTAL \$ 6,177.20

PAID

Detach and mail this section with your check for the total amount due. Make the check payable to Ameritech.

BCATS Billing

Account Number
C6511

Bill Issued
11/20/1996

Mail Payment to:

Due Date	DEC 10, 1996
Total Amount Due	0.00

AMERITECH
P.O. BOX 92471
CHICAGO, IL 60675-2471

Billing Summary

Ameritech

Previous Balance

14.40

Payments

14.40

BROOKS FIBER COMM
 DAN KEY
 575 59TH STREET SW
 GRAND RAPIDS MI 49506

Past Due

0.00

Current Charges

0.00

Total Amount Due

0.00

DETAILED CHARGES

FOR BILL INQUIRY: 1-800-225-1847

ACCT NO: C6512

DUE DATE: DEC 10, 1996

AUTHORIZED BY: TONYA REESE

DETAIL OF CURRENT CHARGES

SERVICES

0.00

MATERIAL

0.00

CONTRACTOR COSTS

0.00

ADJUSTMENTS

0.00

TAXES

0.00

LATE PAYMENT CHARGE

0.00

TOTAL CHARGES FOR THE MONTH OF NOV. 1996

0.00

DESCRIPTION OF SERVICES

ANNUAL BILLING 1/1/96 - 12/31/96

5 ATTACHMENTS ON LANSING @ \$2.88 = \$14.40

PAID

Detach and mail this section with your check for the total amount due. Make the check payable to Ameritech.

BCATS Billing

Account Number

C6512

Bill Issued

11/20/1996

Mail Payment to:

Due Date

DEC 10, 1996

Total Amount Due:

0.00

AMERITECH

P.O. BOX 92471

CHICAGO, IL 60675-2471

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Application by Ameritech Michigan
Pursuant to Section 271 of the
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Provide In-Region, InterLATA
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CC Docket No. 97-137

STATE OF MICHIGAN)

) ss.

Proof of Service

COUNTY OF INGHAM)

Marcele J. Challender, being first duly sworn, deposes and says that on this 3rd day of July, 1997 she served a copy of the Reply Comments of the Michigan Cable Telecommunications Association upon the following individual(s):

Department of Justice
c/o Donald J. Russell
Telecommunications Task Force
Antitrust Division Room 8205
555 Fourth Street, N.W.
Washington, D.C. 20001

ITS, Inc.
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037

Michigan Public Service Commission
6545 Mercantile Way
Lansing, Michigan 48909

by placing the same in an envelope(s) addressed to said individual(s) at the aforesaid business address(es) and sending said envelope(s) via Federal Express.


Marcele J. Challender

Subscribed and sworn to before me
this 3d of July, 1997



SUSAN GOODMAN
Notary Public, Ionia County, MI
Acting in Ingham County, Michigan
My Comm. Expires May 25, 2000